MFP Fire Protection, Inc. *and* Road Sprinkler Fitters Local Union 669, U.S., AFL–CIO. Case 27–CA–13246

August 28, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On May 10, 1995, Administrative Law Timothy D. Nelson issued the attached decision. The Respondent filed exceptions, the General Counsel filed a brief in response, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, MFP Fire Protection, Inc., Colorado Springs, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

Michael T. Pennington, Esq., for the General Counsel.
Rita Byrnes Kittle and *Steven L. Murray, Esqs. (Fattor & Kittle, P.C.)*, of Denver, Colorado, for the Respondent, MFP.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. Road Sprinkler Fitters Local Union 699 (the Union) filed an unfair labor practice charge against MFP Fire Protection, Inc. (the Respondent) on June 28, 1994. After investigating, the Regional Director for Region 27 issued a complaint against the Respondent on August 12, 1994. I conducted the trial of this prosecution in Denver, Colorado, on March 7, 1995.

In the complaint, the Regional Director alleges in the name of the General Counsel of the National Labor Relations Board that the Union has been the exclusive collective-bargaining representative under Section 9(a) of the Act of the Respondent's sprinkler fitters since June 1985, and that since on or about April 26, 1994, the Respondent has been violating Section 8(a)(5) and (1) of the Act[1] by (a) ''fail[ing] and refus[ing] to . . . bargain collectively with the Union concerning wages, hours and other terms and conditions of employment,'' (b) ''withdr[awing] recognition'' from the Union, and (c) ''unilaterally chang[ing] the wages, hour, and other terms and conditions of employment'' of its sprinkler fitters.

In its amended answer, the Respondent admits, and I find, that the Board's jurisdiction is properly invoked,[2] and that the Union is a labor organization within the meaning of Section 2(5) of the Act. The Respondent further admits that, on and after April 26, 1994, it refused to bargain with the Union and repudiated its relationship with the Union and acted unilaterally with respect to the wages, hours of work, and other terms and conditions of employment of its sprinkler fitters. The Respondent, however, denies that the Union was ever the exclusive representative of those employees within the meaning of Section 9(a) of the Act, and avers as an affirmative defense that it has ''lawfully repudiated a bargaining relationship established and maintained in accordance with Section 8(f) of the Act.''

The central issue in the case, after *Deklewa*,[3] is this: Did the Union and the Respondent's bargaining relationship, admittedly begun with a prehire agreement privileged only under Section 8(f) of the Act, become converted to a ''full,'' 9(a) relationship after the Respondent signed one or more written agreements containing acknowledgements that the Union was the 9(a) representative of its employees?

Upon my study of the whole record and the parties' briefs,[4] and based on my findings and reasoning below, I judge that the Respondent's execution of a written acknowledgment in October 1987 was enough to convert the parties' bargaining relationship to one enjoying the full panoply of protections afforded by Section 9(a) of the Act, and that the Union's exclusive representative status under Section 9(a) must be presumed to have continued at all times thereafter. Therefore, I will conclude that the Respondent's admitted repudiation of the bargaining relationship—and its actions after April 1, 1994, related to that repudiation—violated its continuing duty under Section 8(a)(5) and Section 9(a) to recognize and bargain with the Union, and that the Respondent

[1] Sec. 8(a)(5) makes it unlawful for an employer ''to refuse to bargain collectively with the representatives of his employees.'' Sec. 8(a)(1) outlaws employer actions and statements that ''interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.'' Sec. 7 declares pertinently that ''[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]''

[2] Specifically, the Respondent admits, and I find, that; (a) the Union's charge was served on it on or about the date it was filed; (b) the Respondent is a Colorado corporation headquartered in Colorado Springs, Colorado, which; (c) annually buys more than $50,000 worth of goods, materials, or services from Colorado suppliers who themselves received those same goods directly in interstate commerce, and which; (d) annually sells more than $50,000 worth of goods to other Colorado customers who are themselves directly engaged in interstate commerce, and therefore; (e) the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[3] *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

[4] Counsel for the General Counsel and counsel for the Respondent filed timely briefs within the deadline allotted, which was extended by a few days on the Respondent's unopposed request.

thereby committed unfair labor practices, substantially as alleged in the complaint.

FINDINGS OF FACT

The Respondent, operating from offices in Colorado Springs, installs and services automatic fire sprinkler systems. Lawrence Martin formed the Respondent in 1984, and he has been its president and the person in charge of its operations since then. The Union is a labor organization affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the UA). Although the Union is denominated a ''Local'' of the UA, the jurisdiction ceded to it by the UA covers fire sprinkler installation work done throughout the United States. Max Jenkins is the Union's business manager for its ''District 4,'' which covers Colorado and Wyoming.

Collective bargaining in this industry is typically conducted by the Union with National Automatic Sprinkler and Fire Control Association, Inc. (the Association). For decades, those parties have negotiated successive master labor agreements (Association Agreements), which are binding on all of the Association's employer-members nationwide, and on any other, ''independent'' employers in the industry, such as the Respondent, who may assent to their terms.

The parties' relationship began in November 1984, when, after forming the Respondent, Martin signed an agreement tendered by the Union's Jenkins under which the Respondent agreed to be bound by the terms of the then current Association Agreement, which was due to expire on March 31, 1985. On February 20, 1985, when the Association Agreement was about to expire and be replaced by a new one, Martin signed an ''Assent and Interim Agreement'' (A&I Agreement), with the Union. Under this A&I Agreement, the Respondent agreed to be bound by the new, 1985–1988 Association Agreement. The first paragraph of the A&I Agreement said this:

> THIS AGREEMENT is freely and voluntarily made this 20th day of February, 1985 by and between MFP Fire Protection, Inc. (hereinafter referred to as ''the Employer'') and Road Sprinkler Fitters Local Union No. 669 U.A. (hereinafter referred to as ''the Union''), as the exclusive collective bargaining representative of its employees pursuant to Section 9(a) of the National Labor Relations Act, as amended, for the purpose of establishing wages, hours, and working conditions for all journeymen sprinkler fitters and apprentices in the employ of the Employer, and for the purpose of reducing work stoppages, thus preserving a harmonious uninterrupted relationship between the parties.

On October 20, 1987, during the term of the 1985–1988 Association Agreement, Martin admittedly signed a separate document (the October 1987 acknowledgement), which states in full as follows (emphasis in original):

> ACKNOWLEDGEMENT OF THE REPRESENTATIVE STATUS OF ROAD SPRINKLER FITTERS LOCAL UNION NO. 69, U.A., AFL–CIO
>
> The Employer executing this document below has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by [the Union] for purposes of collective bargaining.
>
> The Employer therefore unconditionally acknowledges and confirms that Local 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act.

Martin, although admitting that he signed this acknowledgment, and entered the date ''10–20–87'' on it, claimed not to recall the circumstances surrounding his signing. There is no affirmative, independent evidence in this record that the Union had, in fact, proffered any ''objective and reliable information,'' or that the Respondent had, in fact, ''confirmed'' before Martin signed this acknowledgment that a ''clear majority'' of its bargaining unit employees were ''members of, and . . . represented by'' the Union.

On February 4, 1988, again anticipating the expiration of the current Association Agreement, Martin signed another A&I Agreement, under which the Respondent became bound to the new, 1988–1991 Association Agreement. The 1988 A&I Agreement contained new language in its preamble, as follows:

> The Employer hereby freely and unequivocally acknowledges that it has verified the Union's status as the exclusive bargaining representative of its employees pursuant to Section 9(a) of the National Labor Relations Act, as amended, for the purpose of establishing wages, hours, and working conditions for all journeymen sprinkler fitters, apprentices and pre-apprentices in the employ of the Employer.

On March 29, 1991, Martin signed another A&I Agreement under which he bound the Respondent to the 1991–1994 Association Agreement. This A&I Agreement contained the same, ''freely and unequivocally acknowledges'' language in its preamble that first appeared in the 1988 A&I Agreement.

So far as this record shows, from November 1984 through the April 1, 1994 expiration of the 1991–1994 Association Agreement, the Respondent honored all terms and conditions established by the successive Association Agreements, including by making payments into the health and welfare and pension trusts established by those agreements. In the spring of 1994, however, the Respondent did not sign a new A&I Agreement, and on April 1, 1994, the Respondent ceased making such trust payments and admittedly began to make other unilateral changes in the terms and conditions of employment of its employees in the recognized bargaining unit.

The Union's Jenkins wrote to Martin on April 7, requesting separate negotiations with Martin for a new agreement, and on April 13, Jenkins faxed to Martin a copy of a union bulletin outlining in some detail the changes to the Association Agreement that had been recently negotiated by the national bargaining parties. On April 26, 1994, Martin wrote to the Union's offices in Columbia, Maryland, and mailed a copy of this letter to Jenkins. In that letter, Martin said in material part:

> I have reviewed the terms of the new agreement . . . and have concluded that it would not be in the best interest for [sic] our company.'' Therefore I will not sign nor be signatory to Local 699 at this time.

On May 31, 1994, Jenkins wrote to Martin, again demanding ''that your organization engage in good-faith independent negotiations with the Union for a new collective-bargaining agreement between the parties.'' Martin did not reply to that letter. Nor did he reply to a final letter from Jenkins dated June 23, in which Jenkins objected to the Respondent's refusal to bargain and its having made unilateral changes affecting bargaining unit employees, and demanded that the Respondent ''cease and desist from your unlawful conduct, restore the status quo, and agree to bargain in good faith with Local 669 for a new agreement.''

Analysis

This case is materially identical to and is controlled by the Board's decision in *Triple A Fire Protection, Inc*., 312 NLRB 1088 (1993). There, the employer in October 1987 signed an ''Acknowledgement of the Representative Status of Road Sprinkler Fitters Local Union No. 669'' that was identical to the one that Martin signed on the Respondent's behalf on October 20, 1987. There, as here, many years later, the employer sought to impeach this acknowledgment by arguing that the union never represented an uncoerced majority of its employees, and therefore never achieved lawful, 9(a) status. There, the Board said (id. at 1088–1089),

> By executing the acknowledgement, the Respondent voluntarily and unequivocally granted recognition to the Union as 9(a) representative. It is clear that the parties intended to establish a bargaining relationship under Section 9(a) of the Act. [cit. omitted] Contrary to the approach of the judge and the Respondent, we will not at this late date inquire into the Union's showing of majority status. In *Deklewa*, the Board stated that unions should not have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry. In nonconstruction industries, if an employer grants Section 9 recognition to a union and more than 6 months elapse, the Board will not entertain a claim that majority status was lacking at the time of recognition. As parties in the construction industry are entitled to no less protection against such late claims, we will not entertain a challenge here, where the Respondent voluntarily recognized the Union as a 9(a) representative in 1987 and waited until 4 years later to object. See *Casale Industries*, 311 NLRB 951[.]

The Respondent's arguments in defense break down into two main ones: First, the Respondent argues that Martin, untutored in labor law, did not understand the legal significance of what he was doing when he signed; (a) the 1985 A&I Agreement containing explicit 9(a) recognition language; (b) the October 1987 acknowledgement ''verif[ying]'' the Union's majority status under Section 9(a); (c) the 1988 A&I agreement containing a similar ''verifi[cation]'' that the Union was the exclusive representative of the unit employees under Section 9(a), and; (d) the 1991 A&I agreement containing a ''verif[ication]'' identical to the one he signed in 1988. Second, the Respondent argues that the ''Union'' did not meet its ''burden of showing the parties established a 9(a) relationship.''

The Respondent's first argument amounts to an ''ignorance of the law'' excuse; that is to say, it presents no legally cognizable excuse at all. In any case, the Board's holding in *Triple A Fire Protection* fully disposes of all arguments urged by the Respondent.

Under *Triple A*, the Respondent's October 1987 acknowledgement of the Union's majority representative status under Section 9(a) was alone enough to make it ''clear that the parties intended to establish a bargaining relationship under Section 9(a) of the Act.'' And when the Respondent failed within 6 months thereafter to challenge the Union's majority status under Section 9(a), but instead twice more in the next 4 years signed A&I Agreements ''freely and unequivocally acknowledg[ing] that it has verified the Union's status as the exclusive bargaining representative of its employees pursuant to Section 9(a) of the National Labor Relations Act,'' the Respondent cannot now legitimately claim that ''the Union'' (or the General Counsel) operated under the ''burden'' of making some additional showing that the Union was, in fact, the representative designated by a majority of the employees in October 1987.[5] Rather, following precedent in the nonconstruction sector, the Board clearly held in both *Triple A* and *Casale Industries*, supra, that as a matter of policy, the Board will not even ''entertain'' such ''late claims'' as to a union's majority status at the time the employer initially conferred 9(a) recognition. And if the Board will not entertain any such attacks by the employer after more than 6 months have passed since the initial 9(a) recognition, it necessarily follows that the prosecuting parties operated under no ''burden'' when this case was tried in 1995 to somehow prove by independent evidence that, in fact, the Union had demonstrated its majority status to the Respondent before Martin signed the October 1987 acknowledgement. Under those authorities, as I construe them, the General Counsel satisfied all pertinent burdens when he showed without contradiction; (a) that the Respondent formally acknowledged in October 1987 that the Union was designated by a majority of its bargaining unit employees as—and was—the exclusive representative of those employees within the meaning of Section 9(a);[6] (b) that more than 6 months passed thereafter without any challenge by the Respondent (or anyone else) to the legitimacy of this 9(a) recognitional acknowledgement, and (c) that the Respondent thereafter repudiated the bargaining relationship and made unilateral changes. Under these circumstances, for the Respondent to escape liability for its repudiation in April 1994 of the long established 9(a) relationship with the Union, it must have shown either that, at the time of its repudiation, it had a good-faith doubt based on objective considerations

[5] In arguing that ''the Union'' had the burden of making such a showing, the Respondent relies chiefly on arguments made by Member Oviatt in his dissent in *Casale Industries*, supra at 311 NLRB at 953–954.

[6] Because I find that the Respondent's October 1987 acknowledgment was enough to convert any 8(f) relationship that may have existed previously into a full, 9(a) relationship, I do not reach the General Counsel's alternative arguments that the Respondent's signing of A&I agreements in 1985, 1988, and 1991 containing 9(a) recognition language likewise had such a relationship converting effect.

of the Union's continuing majority support in the bargaining unit, or that the Union did not, ''in fact,'' enjoy such majority support.[7] The Respondent made no effort to meet either of these burdens, and therefore the Union's presumption of continuing majority support has not been rebutted.

CONCLUSION OF LAW

Accordingly, I conclude as a matter of law that when the Respondent admittedly repudiated the bargaining relationship in April 1994, and thereafter made unilateral changes in its employees' wages and other conditions of their employment, it violated its continuing duty under Section 8(a)(5) and Section 9(a) to recognize and bargain with the Union, and thus committed and is committing unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

REMEDY

Because I have found that the Respondent committed these unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. These required actions shall include the following, all of them subject to the Union's duty to make an appropriate request, and all without prejudice to the Respondent's right under the Act, after good-faith bargaining with the Union to agreement or lawful impasse, to implement future changes consistent with any such agreement or its last offer before impasse: The Respondent must fully restore to its bargaining unit employees the wages, hours, and other terms and conditions of employment they enjoyed immediately before the Respondent made unlawful unilateral changes in those areas,[8] and must make them whole by paying them backpay, with interest, for any financial losses they suffered as a consequence of the Respondent's unilateral changes in such terms and conditions,[9] and must make whole the health and welfare and pension trusts established under the 1991–1994 Association Agreement for any losses they suffered as a consequence of the Respondent's unilateral discontinuance of contributions to those trusts on and after April 1, 1994.[10]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, MFP Fire Protection, Inc., of Colorado Springs, Colorado, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Repudiating its 9(a) relationship with Road Sprinkler Fitters Local Union 669, U.A., AFL–CIO (the Union).

(b) Refusing to meet and bargain with the Union for a labor agreement to replace the 1991–1994 Association Agreement which bound the parties until its expiration on April 1, 1994.

(c) Unilaterally changing the wages, hours of work, or other terms or conditions of employment established by the 1991–1994 Association Agreement for its employees in the established bargaining unit of nonsupervisory journeymen and apprentice and preapprentice sprinkler fitters.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Upon the Union's request, and consistent with the remedy section of this decision, take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the Union as the exclusive representative within the meaning of Section 9(a) of the Act of its employees in the established bargaining unit.

(b) Meet and bargain collectively in good faith with the Union over terms of a labor agreement for its bargaining unit employees to replace the terms established in the 1991–1994 Association Agreement, and if such an agreement is reached, reduce it to writing and sign it.

(c) Until such time as it shall have fully discharged its recognitional and bargaining obligations to the Union, fully restore and apply to its bargaining unit employees the wages, hours, and other terms and conditions of employment established by the 1991–1994 Association Agreement.

(d) Make whole those bargaining unit employees, with interest, for any financial losses they suffered as a consequence of the Respondent's unilateral changes in such terms and conditions made on or after April 1, 1994.

(e) Make whole the health and welfare and pension trusts established under the 1991–1994 Association Agreement for any losses those trusts suffered as a consequence of the Respondent's unilateral discontinuance of contributions to those trusts on and after April 1, 1994.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its Colorado Springs offices, and at any of its jobsites where it may be permitted to maintain such postings, copies of the attached notice, marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days

[7] See, e.g., *NLRB v. Curtin Matheson Scientific*, 110 S.Ct. 1542 (1990).

[8] Specifically, where the record shows that the 1991–1994 Association Agreement established the terms and conditions of employment under which the unit employees worked immediately before the Respondent's unilateral changes, this order contemplates that the Respondent shall restore all terms and conditions established by that agreement.

[9] Make-whole amounts owed to employees under this order are to be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970); interest on such amounts is to be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[10] Any amounts that the Respondent must pay to the trusts to satisfy this remedy are to be computed at the compliance stage, consistent with directions in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT repudiate our relationship with Road Sprinkler Fitters Local Union 669, U.A., AFL–CIO as the exclusive representative within the meaning of Section 9(a) of the Act of our nonsupervisory journeyman and apprentice and preapprentice sprinkler fitters.

WE WILL NOT refuse to meet and bargain with the Union for a labor agreement for those bargaining unit employees to replace the 1991–1994 Association Agreement which bound us until its expiration on April 1, 1994.

WE WILL NOT unilaterally change the wages, hours of work, or other terms or conditions of employment established by the 1991–1994 Association Agreement for our bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act.

Upon the Union's request

WE WILL recognize the Union as the exclusive representative within the meaning of Section 9(a) of the Act of our employees in the established bargaining unit.

WE WILL meet and bargain collectively in good faith with the Union over terms of a labor agreement to replace the terms established in the 1991–1994 Association Agreement, and if such an agreement is reached.

WE WILL reduce it to writing and sign it.

Until we have fully discharged our recognitional and bargaining obligations to the Union,

WE WILL fully restore and apply to our bargaining unit employees the wages, hours, and other terms and conditions of employment established by the 1991–1994 Association Agreement.

WE WILL compensate our bargaining unit employees, with interest, for any financial losses they suffered as a consequence of our unilateral changes in such terms and conditions made on or after April 1, 1994.

WE WILL make whole the health and welfare and pension trusts established under the 1991–1994 Association Agreement for any losses those trusts suffered as a consequence of our unilateral discontinuance of contributions to those trusts on and after April 1, 1994.

MFP FIRE PROTECTION, INC.